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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1992

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ERWIN & ERWIN,

Petitioner,

vs.

SUZAN BREWER,

Respondent

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On Petition for Writ of Certiorari
To The United States Court of
Appeals for the Ninth Circuit

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# REPLY BRIEF IN ANSWER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner by way of Reply to Brief in opposition to petition for Writ of Certiorari responds:

CORRECTION:

In the opposition brief, page one "Statement of the Case," it is stated:

> "Erwin & Erwin's statement of the case incorrectly states Brewer did not appeal the reasonable value of its services. Petition for Cert. p. 18. This is wrong; she challenged the entire claim. Lod p. 2-4."

That statement is false.

Lod (presumably "Lodging") 2-4 is moved against to be stricken as not stating where it appears in the record of either appellant court (U. S. District of Oregon or Ninth Circuit Court of Appeals). It appears in neither.

The reason it does not appear in either record is that it remains in and has never left the files of the U. S. Bankruptcy court of the State of Oregon. No appellate judge has ever seen it and therefore could not have relied upon it.

The heading of the two proposed Lodgings is the same:

"UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF OREGON."

The statement on page 18 of petitioner's brief is precisely accurate and is repeated: It states:

"The 'reasonable' value of services was not appealed."

The District Court excised the bankruptcy court record on appeal to that court as to "reasonableness" on motion of Brewer (Pet p. 17-18).

RULE 15 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

This rule requires that a brief in opposition to a petition for Writ of Certiorari should contain arguments:

> ". . .for denying the petition and address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted."

No misstatements of fact or law contained in the petition are addressed in the brief in opposition other than the fact noted above which was apparently deliberately, erroneously, or perhaps intentionally misleading.

We will briefly examine the elements upon which petitioner claims that the Writ should be granted pointing out that nothing appears in the opposition's brief which takes issue with any contention in support of the writ.

## ARGUMENT

1. THE CONTENTION:

The petition first contends that Fed. R. of App. P. 38 is not applicable because the rule does not apply to "appellants" as realligned by the court. The rule only applies to "appellees." Brewer was the appellant as realligned by the court. (Pet p. 25-28)

The RESPONSE:

The brief in opposition does not take issue with that contention either as to the court's reallignment or as to the language, intent, or purpose of Rule 38 as applied to the levy of the sanction by order of the Ninth Circuit Court of Appeals order of March 24, 1993.

2. The CONTENTION:

The petition next contends that Fed. R. App. P. 38 has no application to a motion to recall the mandate under Fed. R. Civ. P. 60 for a demonstrated mistake

which was that the Ninth Circuit held a de novo bankruptcy trial under the mistaken belief that it was doing so on the record in the bankruptcy court. (Pet. p. 28 et seq.)

The contention further is that Fed. R. App. P. 38 permits sanctions by way of "damages" to an appellee for a frivolous appeal or double or single costs (Pet. p. 31). No other sanction is permitted, and a $2500 sanction relates to nothing.

The RESPONSE

The brief in opposition does not take issue with the contention either as to the applicability of Fed. R. App. P. 38 or to Fed. R. Civ. P. 60 motion or as to the error of the court.

3. The CONTENTION:

The petitioner next contends that Fed. R. App. P. 38 applies only to frivolous appeals and that petitioner's

appeal was not "frivolous as either a matter of law or fact." (Pet. p. 33)

The RESPONSE:

The brief in opposition does not address the question of whether or not the appeal was frivolous.

In fact, the brief in opposition agrees that the sanction of March 24, 1992, was based solely on the bankruptcy court's factual determination decision allowing the claim of Erwin & Erwin P. C. and not on the appeal.

> "Because the claim of Erwin & Erwin was so absurd and implausible that it should not have appealed its its denial to that court." (Ninth Circuit) (Br. Opp. p. 4)

Judge Alarcon's dissent is not even mentioned in the brief in opposition.

Judge Alarcon's statement was: (Pet. Ap. p. 68)

> "Punishment of a party that prevailed in the trial court under Rule 38 for seeking to uphold a favorable judgment appears to be a bizarre application of a rule designed to discourage frivolous appeals by the party that lost in the trial court."

It is not challenged in the brief in opposition.

It would have been even more bizarre if it had been known that it was the Ninth Circuit panel itself which failed to discover that it was relying on a record which it never examined and which it erroneously stated was nonexistent.

The brief in opposition does not take issue with the contention that this is a matter of first impression. (Pet p. 66)

4. The CONTENTION:

It was error for the Ninth Circuit panel to consider that "de novo" meant that the Court of Appeals was required to consider the entire bankruptcy proceeding de novo. (Pet. p. 69)

"De Novo" consideration is de novo on the record made in the lower court and not a record made in some other court. It is the decision of the District Court based upon the record before it that the Ninth Circuit must consider de novo on appeal and not the decision of the bankruptcy or some other court whose record is not before it.

Br. 8013 requires affirmance of disputed factual questions on appeal.

The RESPONSE:

The brief in opposition does not address the contention.

The objection is meritless.

5. The CONTENTION:

Petitioner contends next that the Court of Appeals failed to follow its own rules on en banc consideration by the Ninth Circuit Court of Appeals of petitioners' motion for reconsideration of the panel's decision of March 24, 1992, awarding sanction of $5058. and for failing to allow en banc consideration of the Fed. R. Civ. P. 60, review of the decision of August 26, 1991, and awarding an additional sanction of $2500. (Pet. p. 54).

The RESPONSE:

The brief in response does not address this issue in any manner.

6. The CONTENTION:

The petitioner contends that to levy a devastating sanction unauthorized by any definitive standard without notice or hearing violates provisions of

the Fifth and 14th Amendments to the UNITED STATES OF AMERICAN CONSTITUTION. (Pet. p. 62)

The RESPONSE:

The contention is not addressed as to either fact or law.

7. The CONTENTION:

Petitioner contends next that both the District Court and the Court of Appeals failed to consider, recognize, or apply the provision of 11 U.S.C 502 (b) (4) (Pet. App. 270) which mandates allowance of an "insider" or "attorney for the debtor's" fees as a claim in bankruptcy but only as to reasonable value thereof, as distinguished from a contractual consideration (Pet. p. 43).

Of equal importance is the contention that neither appellate court considered the admonition of Bankruptcy Rule 8013 (Pet. p. 43). (See Anderson v. City of Bessemer, Pet. App. 240, 251, 257, 260., 264.) (1985)

The RESPONSE:

The brief in response does not address those contentions in any manner.

CONCLUSION

As demonstrated above, the brief in opposition does not address any contentions made in support of the petition for certiorari.

Petitioner, however, wishes to point out the misstatements made in the opposition brief to illustrate the tactics adopted by Brewer and her attorneys in all phases of this litigation.

Since those misstatements are not responsive to Rule 15 of the Rules of this court in that they have no bearing on any issue which would be before the court if certiorari were granted, yet, the same tactics were successful in the District Court of Oregon and the Ninth Circuit Court of Appeals.

A reading of the statement of the case in the Brief in Opposition will convince the reader that the recitations constitute merely a narrative statement of conclusions and irrelevant matter of the pleader.

There is absolutely nothing in the record of any appellate court to support the recitation of the history of the case as embellished by those recitations.

To illustrate:

The first statement claims that Brewer contested not only the "intent to make a gift" decision of the bankruptcy court, but also "the reasonableness of value of the services rendered by Erwin & Erwin, P.C. to Marquam Investment," and references objections made in the bankruptcy court which are attempted to be filed as "Lodgings" as though binding on appellate courts.

These objections to services found by the bankruptcy court to have been actually performed and reasonable in amount were specifically excised by the District Court on motion of Mr. Robinowitz himself (Pet. p. 17-18).

His so-called "Lodgings" were bankruptcy court documents not designated for inclusion in any record on appeal.

It should not be forgotten that the District Court did not grant any argument on the appeal but adopted a history based upon a multitude of unrelated and inaccurate matters - never having seen the record of any court.

On page two, Br. 2, Mr. Robinowitz states that Brewer objected to the claim based upon a contention that the claim was "fabricated" for the purpose of the bankruptcy and to prevent Brewer from collecting her punitive damages award.

Without any fear of contradiction, petitioner states unequivocally, that no contention of "fabrication" was ever made either in the trial court nor in any appellate court and the so-called Lodgings so illustrate.

How could the Erwin & Erwin claim be "fabricated"? Impossible! - it is admitted in the next preceding sentence that the claim was for services actually performed in defending the Brewer claim and many other legal matters such as work performed for debtor's condominium development.

Did Brewer and Robinowitz think that Marquam would not seriously defend what Marquam felt was a totally illegal claim and based upon false testimony? Whether Erwin Lamb & Erwin, P. C. was counsel, or whether some other legal firm had been selected, Marquam would have

defended, and the costs and attorney fees would have been incurred.

Was Marquam justified in employing counsel to defend against an unjust and improper claim? This claim was tried to a jury; Brewer lost, and appealed to an appellate court, which ordered a new trial on the basis of an heretofore unrecognized theory of intentional infliction of emotional distress. It was set aside by two courts (one on appeal) and the second, by the trial judge before whom the punitive damage award was secured? (See 6 A.L.R.4th 503)

If appellate decisions are to be considered here without any request for judicial notice (See Fed. Rules of Evidence, Rule 201) then this Court should know that Marquam Investment through its attorneys Erwin & Erwin, P. C. filed a Forcible Entry and Detainer action which was postponed by the tactic

of filing by Brewer of some 11 improper answers, all stricken on motion.

When ultimately tried "to a court" as requested by Brewer instead of a jury, the court held in favor of Marquam Investment Corporation and awarded attorney fees.

See the following:

F.E.D. judgment 40 Or. App. 175, 594 P.2d 1327 Marquam Invesment Corporation v. Brewer)

As to services rendered, see the following as a partial example of services performed by Erwin & Erwin, P. C. in behalf of Marquam.

Brewer v. Beers, 280 Or. 251, 570 P.2d 650, Brewer v. Erwin, 287 Or. 435, 600 P.2d 398, 6 A.L.R. 4th 503, 61 Or. App. 642, 658 P.2d 1180 (Rev. Den.) 662 P. 2d

728, 294 Or. 792, Opinion clarified., 70 Or. App. 709, 690 P.2d 1122, (Rev. Den.) 299 Or. 31, 698 P.2d 31, Withdrawn, 299 Or. 118, 698 P.2d 964; Mod. adherred to 75 Or. App. 132, 705 P.2d 242, Rev. Den. 300 Or. 162, 707 P. 2d 584. and Brewer v. Erwin, 61 Or. App. 642, 658 P.2d 1180, Rev. Den. 294 Or. 792, 662 P. 2d 291.

The foregoing do not include services as to other matters where Brewer was not a party and for monetary advances.

Of all of the false and irresponsible statements of counsel for Brewer, none is perhaps more open, nortorious, and blatant than that appearing on page two of the brief in opposition wherein it is stated:

"Brewer objected to this claim contending that Erwin and Erwin fabricated it for the purposes of the

bankruptcy to prevent her from collecting her punitive damage award. " There was no such claim ever made, and none proven or which could even be suspicioned. On page three, it is stated:

"The evidence was overwhelming that the claim was a fabrication by Erwin & Erwin to try to thwart Brewer from collecting her judgment."

When it is admitted the services were performed and were performed in behalf of the debtor in defense of numerous false claims made by plaintiff, it is almost inconceivable that supposedly competent lawyers would attempt to fool the United States Supreme Court by alleging for the first time that the claim of Erwin & Erwin was fabricated.

For Oregon law holding that it would be unconstitutional to prevent a party from obligating itself for legal fees in defense of a claim, see "Submittal B."

page 11 citing the case of Nelson v. Hauser, 278 Or. 571, 577, 565, P.2d 729 (1977) and others.

Let's consider one or two of many examples of trial court untruths:

1. Robinowitz stated to Judge Hess in open bankruptcy court that Erwin & Erwin had created the lease some years after its date and after the bankruptcy was filed, and that he would prove it. After a year's delay in securing an order to withdraw the lease, Mr. Robinowtiz forwarded the document to internationally recognized experts on ink dotting and forgery. The results were, of course, negative and the statements he made were false.

2. Robinowitz stated to Judge Hess that he would prove by a C.P.A. that if the liability of Marquam to Erwin & Erwin was intended, it would appear on the books and financial statements of Marquam

Investment Corporation. His accountant witness testified that accrued liabilities NEVER would appear on the records of a cash-basis taxpayer. Only on books kept on accrual basis would such a liability be shown or accrued. The statement of Robinowitz was false.

The trial of Brewer's claim on remand resulted in a mistrial because her counsel had directed a youthful witness to testify that he did not wish to give his address because this 200-lb witness was afraid of Mr. Erwin (65 years old). Witness and address was listed in tele-one book. Page limits prevent recitation of at least five opprobrious, direct, and false representations made to the trial court of which counsel Robinowitz had not the slightest proof or suspicion. The entire proceedings properly become suspect.

Respectfully submitted,

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